So Long, Chevron: What The Elimination Of Agency Deference Means For Employers And The Future Of Labor And Employment Law

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Generally speaking, it's difficult to drum up excitement about administrative law (except amongst those of us who deal regularly in the labor and employment law arena and other highly regulated areas of law). That has now changed given the Court's decision in *Loper Bright Enterprises, Inc. v. Raimondo*, 603 U.S. __ (2024) (*Loper Bright*). This decision will undoubtedly have a meaningful impact on the future of labor and employment law and how employers will likely (and should) approach problem-solving and litigation in the future. It's critical that employers now pay attention, if they have not been already.

On June 28, 2024, the U.S. Supreme Court overruled *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (*Chevron*). The end of *Chevron* means the end of decades of deference given by courts to federal agencies when an agency's interpretation of ambiguous or silent text in a federal statute was challenged. That is a big deal. With the ushering in of *Loper Bright*, courts "may not defer to an agency interpretation of law simply because a statute is ambiguous" because courts, rather than agencies, have sole competency to resolve statutory ambiguity. Because countless statutes task federal agencies with administering and enforcing laws, issuing rules and regulations, and deciding disputes—often requiring an agency to fill in a gap or construe statutory text—the end of *Chevron* deference is truly a once in a generation change in law. No longer will federal agencies waltz into court with the upper hand, expecting to rely upon *Chevron* to carry the day. Instead, they will need to have another plan.

THE CHEVRON DOCTRINE

Since the *Chevron* decision in 1984, arguably one of the most influential U.S. Supreme Court decisions in history, federal agencies were given considerable latitude to interpret statutes, and challenges to those agency interpretations were difficult to prevail upon. In short, courts deferred broadly to agency expertise, and did so mechanically as a matter of course. Not surprisingly, over time, federal agencies—for example, the U.S. Equal Employment Opportunity Commission (EEOC), National Labor Relations Board (NLRB), Occupational Health and Safety Administration (OSHA), and U.S. Department of Labor (DOL)—have gotten comfortable regularly invoking the *Chevron* doctrine, and with great success.

Under the old *Chevron* guard, a challenge to an existing agency action or interpretation of law

played out as follows. When an agency's action and interpretation of a law (for example, a final rule issued by that agency) was challenged in court, the court followed a two-step analysis.

- First, the court determined "whether Congress has directly spoken to the precise question at issue." If the answer was no—meaning the governing statute was ambiguous or silent—then the court would proceed to step two of the analysis: "whether the agency's answer is based on a permissible construction of the statute," later formulated as a "reasonableness" standard (even if the court would have reached a different conclusion). This standard made it very difficult for challenges to agency actions to prevail. Under the first step, the challenging party would have to prove that the governing statute was "unambiguous," which often was not the case (for example, think about how Title VII has evolved since it was passed in 1964 and did not contemplate the nuances of a modern, evolving workplace). In other words, statutes are often ambiguous, and sometimes purposefully so.
- Moving to step two, the court would then determine whether the agency's interpretation was "reasonable." In practice, this meant that agency interpretations of law (even if they pushed the envelope of "reasonableness") were typically upheld, as agencies almost always won on step two. As you can imagine, this further emboldened agencies and shaped their litigation strategies over time, as agencies knew they had a leg up in court.

LOPER BRIGHT – A GENERATIONAL CHANGE IN LAW

Then came *Loper Bright*, much to the chagrin of federal agencies. In a 6-3 decision across party lines, the U.S. Supreme Court held that the Administrative Procedure Act (APA) requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency interpretation of the law simply because a statute is ambiguous. Agencies, according to the Court, "have no special competence at resolving statutory ambiguities. Courts do." Going forward, courts must do what they do best and "use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity." Without *Chevron*, no longer will courts "mechanically afford binding deference to agency interpretations," bucking the decades-old trend.

The Court noted that prior decisions relying on the *Chevron* framework are not overturned, providing some continuity for prior holdings based on *Chevron*. Of course, it's not that simple. Shortly after *Loper Bright*, the U.S. Supreme Court in *Corner Post, Inc. v. Bd. of Governors of the Federal Reserve System*, No. 22-1008 (July 1, 2024) (*Corner Post*) issued a decision addressing when claims brought under the APA accrue for purposes of the general six-year statute of limitations under federal law. The Court held that the limitations period for APA claims runs from the time of a plaintiff's injury. Previously, most circuit courts had held that the limitations period for APA challenges instead began on the date of the final agency action (that is, when a regulation was issued) and without regard to when a plaintiff was injured. Now, *Corner Post* has breathed (even more) life into an opportunity to file challenges to agency regulations, which, as Justice Ketanji Brown Jackson noted, could cause a "tsunami of lawsuits."

WHAT DOES THE END OF CHEVRON MEAN FOR EMPLOYERS, AND THE FUTURE OF LABOR AND EMPLOYMENT LAW?

What does the death of *Chevron* by *Loper Bright* mean? In its simplest form, the decision means that it will be more difficult for federal agencies to defend challenges to their regulations going forward. Agencies will increasingly be taken to task for an interpretation of law, or agency action, that strays

too far from the statutory language (i.e., agencies will likely be playing defense, not offense). Now, without *Chevron* to fall back on, agencies will need to carefully consider the positions they take with respect to the statutes they are empowered to interpret and enforce. Undoubtedly, challengers to agency actions will point to the absence of *Chevron* in support of their position that an agency's interpretation of law is unfounded (and indeed, already have).

The absence of *Chevron* will also likely lead to inconsistent results, as challenges to agency actions will be made across jurisdictions, with some federal courts upholding agency interpretations and others rejecting them. This will further complicate matters and pave the way for litigation to funnel to the U.S. Supreme Court. In fact, there are already a number of pending challenges to agency decisions underway, which will likely be affected by the post-*Chevron* world (such as the FTC's noncompete ban, the DOL's overtime rule, the EEOC's final rule involving accommodations under the Pregnant Workers Fairness Act, and more). *Loper Bright* also comes at a time when notable changes to federal labor and employment laws are already happening, such as limits on the use of administrative proceedings (*see SEC v. Jarkesy*), the standard for requesting an injunction under the NLRA (*see Starbucks v. McKinney),* and a new framework for when employers are required to bargain with a union (*see Cemex Construction Materials Pacific, LLC v. NLRB*). More on these cases later.

What does the *Loper Bright* decision itself mean for employers? Today, nothing. Employers do not need to modify their existing policies or implement any changes to their workforce (as they would need to if the FTC's non-compete ban goes into effect on September 4, 2024). *Loper Bright* was not even a case that involved labor and employment law. However, with *Chevron* deference eliminated, employers *should* be paying attention to decisions involving challenges to federal labor and employment law agency actions and thinking creatively about how *Loper Bright* can be an asset. Whether an employer finds itself in an administrative proceeding involving a law that is being challenged in the same (or even in a different, non-binding) jurisdiction, or a litigation in which arguments are being framed around existing agency interpretations of law, *Loper Bright* (and more simply, the elimination of *Chevron* deference that makes it more likely that an agency action or interpretation will not stand) is an important tool in the toolkit. It's one that should not be overlooked.

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For questions and guidance about the impact of *Loper Bright*, please contact a member of Kelley Drye's Labor and Employment team.